IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

WILLIAM HAWKINS, Plaintiff	)	
V.	)	No. 1:94CV25-B-D
TORO COMPANY, d/b/a LAWN-BOY, Defendant	)	

MEMORANDUM OPINION

This cause comes before the court upon the motion of defendant Toro Company d/b/a Lawn-Boy to dismiss. Upon consideration of the motion, the plaintiff's response thereto, the affidavits and the memoranda submitted by the parties, the court is prepared to rule.

In this action, plaintiff William Hawkins asserts two causes of action against his former employer Toro Company (Toro): (1) breach of contract; and (2) breach of implied covenant of good faith and fair dealing. The facts material to this motion and to which there is no genuine dispute are as follows:

FACTS

The plaintiff was fired by the defendant after nine and a half years of employment on October 28, 1993. The alleged reason for discharge was the plaintiff's use of abusive language towards employees found in a break room. It is undisputed that there was no written contract of employment. Throughout the plaintiff's employment, the defendant maintained a progressive disciplinary system outlined in the company's employee handbook. This system provided corrective action guidelines for certain employee

misconduct, escalating to termination if circumstances warranted. In relevant part, the policy provided as follows:

> From time to time, problems arise that relate to attendance, work performance or disruptive behavior. Every employee will be given the opportunity to correct such problems. Corrective actions will follow a 4-Step plan:
>
> STEP #1 - COUNSELING - Your supervisor will counsel you about the problem. He or she will discuss with you and help you correct the problem. A record may be made of this counseling and submitted to your personnel file.
>
> STEP #2 - WRITTEN WARNING - Should the problem continue, your supervisor will counsel you again. He/She will issue you a written warning pertaining to the problem. This warning will be placed in your personnel file.
>
> STEP #3 - FINAL WRITTEN WARNING - Should the two previous corrective actions fail to resolve the problem, your supervisor will issue you a final warning. This statement will serve as the last notice or counseling in an attempt to correct the problem. When a final written warning is issued, an employee should be aware the problem has progressed to an extreme level. Immediate correction of the problem is expected.
>
> STEP #4 - TERMINATION - If all attempts to correct a particular problem has [sic] failed, termination of employment will occur. Termination of any employee will be reviewed by the supervisor of the department, the department manager and must have the approval of the Employee Relations Manager and the Plant Manager.
>
> Occasionally, circumstances involving a problem may be severe enough to warrant skipping a step or steps in the process. Any corrective action that does not follow the steps outlined above must have the approval of the Employee Relations Manager or Plant Manager.

Toro does not dispute the allegation that it skipped these procedures in terminating Hawkins, and the facts do not indicate that it was a "severe" enough incident to warrant skipping the procedures promulgated under its employment manual.

During the plaintiff's orientation as an new employee, he was given an employee handbook which contained the aforementioned

discipline system. The plaintiff was also given a document titled "Orientation Procedures" which listed areas to be discussed during the orientation and also served as a receipt for the handbook. In relevant part, the receipt, signed by the plaintiff, provided:

> I acknowledge receipt of the OMC-Sardis/Oxford handbook, and recognize our employment as one which is at will and can be terminated by the Company or myself with or without notice or with or without cause.

Hawkins stated that he did not recall signing any document that said the company could fire him for no reason. Accordingly, the plaintiff contends that while there was no written contract of employment, the dissemination of the employee handbook providing for a progressive system of discipline created a "for cause" standard for terminating an employee.

Later versions of the handbook contained an "Acknowledgement" page serving as a receipt and an express disclaimer. It provides:

> I acknowledge receipt of my employee handbook. I have been advised that this handbook represents a summary of the rules, policies and procedures in effect at this time. The contents are not all inclusive and may be revised from time to time as the company sees fit. This handbook does not represent a contract of employment, and my employment relationship with the company is an "at will" relationship which may be terminated at any time, by either party, with or without notice and with or without cause.

This page of the handbook provided a line for the employee's signature as well as one witness. It is not contested that the plaintiff did not sign this page and turn it in to the company. The defendant moves for dismissal of the plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6). Jurisdiction of the court is predicated on diversity. 28 U.S.C. § 1332.

STANDARD FOR SUMMARY JUDGMENT

Although the defendant's motion is postured as a motion to dismiss, the defendant has submitted a document -- the signed handbook receipt -- as a challenge to the sufficiency of the plaintiff's claim; and the plaintiff, after being given an opportunity to respond, has likewise presented evidentiary material in support of his response. Since evidentiary documents have been submitted with the motion, the court treats the motion in its entirety as one for summary judgment pursuant to Fed. R. Civ. P. 56. Wright and Miller, Federal Practice and Procedure, Civil 2d § 1366. Summary judgment is appropriate "if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In support of a motion for summary judgment, the moving party must provide the court "the basis for its motion, and identifying those portions of [the evidence] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct 2548, 2553, 91 L. Ed. 2d 265 (1986). In order to survive summary judgment, the nonmoving party must then show that there is "a genuine issue of fact concerning as essential element of the claim on which judgment is being sought." If the nonmovant cannot show this, or a valid reason why they are unable to do so, summary judgment is proper. Bordelon v. Block, 810 F.2d 468 (5th Cir. 1987).

DISCUSSION

The defendant has moved for summary judgment on the plaintiff's breach of contract and breach of covenant of good faith and fair dealing claims on the basis of the "at will" employment doctrine. At will employment, as defined by the Mississippi Supreme Court in Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 874-75 (Miss. 1981), is as follows:

> The employee can quit at will; the employer can terminate at will. This means that either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract.

Id. Mississippi to date still follows the common law rule that "where there is no employment contract (or where there is a contract which does not specify the term of the worker's employment), the relationship may be terminated at will by either party." Perry v. Sears, Roebuck & Co., 508 So. 2d 1086, 1088 (Miss. 1987); Shaw v. Burchfield, 481 So. 2d 247 (Miss. 1985). Mississippi has followed this rule since 1858. See Butler v. Smith & Tharp, 35 Miss. 457, 464 (1858).

I. BREACH OF CONTRACT

Without the establishment of a contract, there can be no action for its breach. The plaintiff argues that the progressive disciplinary system in the handbook created contractual obligations on the part of the defendant, and thereore failure to follow these procedures in discharging him resulted in a breach. The questions to resolve therefore are: (1) what relationship existed when Hawkins was first employed, and (2) was this relationship modified by the subsequent versions of the handbook?

In Solomon v. Walgreen, 975 F.2d 1086, 1089-90 (5th Cir. 1992), the Fifth Circuit, construing Mississippi law, faced a very similar question. In Solomon, the plaintiff, in acknowledging the controlling at will doctrine, alleged that a contract existed as evidenced by letters to her from the Walgreen management as well as the employment manual and handbook. Id. at 1089. However, the plaintiff had signed an employment application which specifically disavowed any intent to create contractual rights through any representations made on behalf of Walgreen. Id. at 1089-90. The application at issue in Solomon, in relevant part, read as follows:

> I understand that my employment with Walgreen Co. is for no definite period and may be terminated at any time, with or without cause, and with or without any previous notice, at the option of either Walgreen Co. or me.

Id. The Fifth Circuit held that this express disclaimer in the plaintiff's employment application "clearly indicate[d] that the relationship between the two parties was at will." Id. at 1090.

Furthermore, the Mississippi Supreme Court in Perry, held that although Mississippi does follow the rule that personnel manuals can create contractual obligations, an express statement in an employment agreement will preclude an action for its alleged breach. Perry, 508 So. 2d at 1088. In Perry, the plaintiff asserted a breach of contract claim based on an alleged implied contract created by the employee handbook. Id. In denying this claim the court concluded that "the explicit statement in the personnel handbook that Perry could be terminated at will is more than sufficient to defeat his action insofar as it is based on breach of contract." Perry, 508 So. 2d at 1088-89. Hawkins

asserts that Perry is not controlling because the disclaimer was not part of the employee handbook when Hawkins accepted employment. This argument is unpersuasive in light of Solomon. As noted supra, the Fifth Circuit did not rely on the disclaimer physically being part of the handbook to conclude that the plaintiff accepted an at will relationship.[1] Thus, absent evidence to the contrary, the receipt signed by the plaintiff in the case sub judice, clearly negates any inference that the initial employment relationship was anything other than at will. See also Samples v. Hall of Mississippi, Inc., 673 F.Supp. 1413, 1418 (N.D.Miss. 1987) (express declaration by employer of intent not to incorporate policy provisions into oral contract, as a matter of law, was not promise of continued employment and, therefore, employee could be terminated at will).

Nonetheless, the plaintiff attempts to rely on Bobbitt v. The Orchard, Ltd., 603 So. 2d 356 (Miss. 1992), to support his contention that an implied contract was created, evidenced by the employment handbook. In Bobbitt, the Mississippi Supreme Court was called upon to review the termination of a nurse by her employer for insubordination. In reversing the circuit court's grant of

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[1] In the brief he submitted to this court, Hawkins also attempts to distinguish Perry by pointing out that the disclaimer defendant relies upon is not highlighted, boldfaced, or in any way made to stand out. He fails, however, to cite any authority for this distinction or explain why such language requires highlighting or boldface. The language is straightforward and not buried in fine print. Indeed, it is the only paragraph on the page. Additionally, Hawkins fails to address the lack of highlighting or boldface in Solomon, Samples, and Shaw, each of which held to preclude an action for breach.

summary judgment for the employer on the basis of the at will employment doctrine, the court held that absent contractual language to the contrary, if the company promulgates procedures to be followed in the event of an employee's infraction of the rules, "the employer will be required to follow its own manual in disciplining or discharging employees for infractions or misconduct specifically covered by the manual." Id. at 357.

This case, however, cannot provide any solace to the plaintiff. Indeed, the express holding in Bobbitt serves to distinguish itself from the case at bar. The Bobbitt court predicated its holding on the fact that there was "no express disclaimer or contractual provision that the manual did not affect the employer's right to terminate the employee at will...." Id. at 362. As such, Bobbitt does not change the result dictated by Perry. Where a disclaimer specifically reserves the right to terminate an employee at will, no contract action lies. Thus, the express disclaimer in the receipt signed by Hawkins serves to preclude any reliance on provisions in the handbook. Moreover, since the later versions of the handbook in effect at discharge contained language expressly disclaiming any intention to create a contract, and the plaintiff was on notice of such language, Perry is directly on point. See Nichols v. City of Jackson, 848 F.Supp. 718, 724 (S.D.Miss. 1994) (construing Mississippi law) (employee has duty to follow provisions of handbook that are reasonably believed to be current, conversely, employee cannot rely on handbook provisions he is aware are no longer current).

Once the court determines what relationship existed upon employment, the court must then determine if that relationship was later modified. Solomon, 975 F.2d at 1090. Accordingly, the plaintiff attempts to argue that by not signing later versions of the handbook which contained an "Acknowledgement" page he somehow created contractual obligations so that he could not be terminated but for cause. This argument is unpersuasive. The signature page of the revised handbook purports only to acknowledge receipt of the handbook, not acceptance of an employment relationship. Hawkins cannot change the nature of his employment simply by not signing a document that invites the same at will relationship. Hawkins was bound by his initial employment agreement to be an at will employee and nothing in the later versions of the handbook could be construed as modifying Hawkins' at will status.

Additionally, the plaintiff contends that since the handbook and the disclaimer contain "diametrically opposed language" concerning job security, an ambiguity exists which, in itself, removes this case from a summary judgment posture. No such ambiguity exists. Hawkins signed a receipt when he received his handbook that expressly stated in clear and unambiguous language that his employment relationship could be terminated by the company or by him with or without notice and with or without cause. Furthermore, the handbook in effect when Hawkins was discharged clearly stated that "[t]his handbook does not represent a contract of employment...." See Nichols, 848 F.Supp. at 724 (employee bound by terms of current handbook). In light of these clear terms, this

court cannot infer any intention to create contractual obligations on behalf of Toro or that any reliance on such provisions was reasonable.

II. Breach of Implied Covenant of Good Faith and Fair Dealing

The plaintiff also contends that the failure to follow the employee handbook represents a failure to carry out the employment relationship in good faith. In support of this argument, the plaintiff cites two cases, Empiregas, Inc. of Kosciusko v. Bain, 599 So. 2d 971 (Miss. 1992), and Cenac v. Murry, 608 So. 2d 1257 (Miss. 1992). In Empiregas, the Mississippi Supreme Court refused to enforce a noncompetition agreement, finding that Empiregas breached its duty to deal in good faith by firing Bain without good cause. Empiregas, 599 So. 2d at 977. Thus, the issue in Empiregas was not the propriety of the termination but, rather, the subsequent enforceability of the noncompetition agreement. McArn v. Allied Bruce-Terminex Co., Inc., 626 So. 2d 603, 607 (Miss. 1993) (main thrust of Empiregas was that employee discharged in bad faith would not have noncompetition agreement enforced upon him). Empiregas, therefore, is inapposite.

Moreover, the plaintiff has failed to distinguish Perry as controlling on this issue. The Perry court when faced with the same claim held that even in the minority of states that allow such an action, "that where the employee has signed an explicit agreement that he can be terminated at will, [an] action under the implied covenant for good faith and fair dealing is precluded." Perry 508 So. 2d at 1089 (citing Crain v. Burroughs Corp., 560

F.Supp. 849 (C.D.Cal. 1983); Maxwell v. Sisters of Charity of Providence, 645 F.Supp. 937 (D.Mont. 1986)). The court concluded that Perry's discharge did not violate any public policy exception and declined to overrule Kelly in its pronouncement that even a retaliatory discharge for filing a worker's compensation claim does not create a private right of action. Kelly, 397 So. 2d at 877.

The plaintiff next cites Cenac v. Murry, 609 So. 2d 1257 (Miss. 1992), as broadly proclaiming an implied obligation of good faith to contracts generally. In Cenac, the plaintiffs filed suit over a "Contract For Deed" praying for rescission of said contract. Id. at 1259. The Mississippi Supreme Court reversed the circuit court's ruling, finding that the plaintiffs "clearly proved that the Murrys breached the covenant of good faith inherent in every contract in our law." Id. This case, however, does not address the issue at hand -- whether an at will employee (not one under a contract) can maintain a cause of action for breach of good faith and fair dealing. In Hartle v. Packard Elec., 626 So. 2d 106 (Miss. 1993), the court, citing Perry, concluded that "at-will employment relationships are not governed by an implied covenant of good faith and fair dealing." As with Perry, even if the Mississippi Supreme Court were to adopt this approach, the plaintiff would not prevail on the facts before this court. Perry, 508 So. 2d at 1089. McArn, 626 So. 2d at 606. This court is, therefore, Erie-bound to follow the decisions in Perry and Hartle and hold that, as a matter of law, Hawkins' claim for breach of

good faith and fair dealing is precluded.[2]

CONCLUSION

In sum, the court finds that the defendant is entitled to summary judgment on all claims pled in this action. The progressive disciplinary system is neither a contract nor amounts to a contract that would require the defendant to discharge the plaintiff for cause. Furthermore, the law does not recognize an action for breach of good faith and fair dealing where there is no underlying contract and the employment relationship is at will. Accordingly, summary judgment will be granted on both causes of action.

An order in conformance with this opinion will issue.

THIS, the _____ day of January, 1995.

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NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

[2] Erie R.R v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).